

**MINUTES OF THE
LEGISLATIVE RECORDS COMMITTEE**

November 12, 2002 – 11:30 a.m. – Room 305 State Capitol

Members Present:

Speaker Martin R. Stephens, Chair
Sen. Mike Dmitrich
Rep. Ralph Becker

Members Absent:

President Al Mansell, Vice-Chair

Staff Present:

Mr. Michael E. Christensen, Director
Ms. M. Gay Taylor, General Counsel
Ms. Beverlee LeCheminant, Secretary

Note: A list of others present and a copy of materials can be found at <http://www.image.le.state.ut.us/imaging/history.asp> or by contacting the Office of Legislative Research and General Counsel.

1. Committee Business

Chair Stephens called the meeting to order at 11:50 a.m.

2. Introduction and Overview

Ms. Gay Taylor said Michael Christensen, on behalf of the Legislative Records Committee (LRC), received a request to review an appeal of a denial of a records request. This request by Mr. Brent Poll been made of the Legislative Auditor General's office through their records officer, Tim Osterstock, then with Wayne Welsh, Legislative Auditor General, and then came directly to LRC. She indicated that page 20 of the mailing packet highlights what LRC's responsibilities are. One is to meet no later than 30 days after an appeal is received. The meeting was postponed beyond the 30 days at the request of Mr. Poll. Subsection (9) on page 21 of the mailing packet states "LRC shall allow the parties to speak on the issues or present evidence and allow other interested parties to comment on the issues. The policy also provides that LRC may also review the disputed records in camera. Ms. Taylor stated that the records in dispute have been set up in Room 303 if LRC decides to review them. Subsection (12) of the policies provides that no later than three business days after the hearing, LRC is to issue a signed order either granting the petition in whole or in part or upholding the determination of the legislative officer in whole or in part. Subsection (13) highlights what the order should include. She said that Mr. Poll also made a request for records directly to the University of Utah and a history of that request is included in the packet. Also included in the packet is a memorandum from Mr. Robert Payne, Associate General Counsel, University of Utah, highlighting the university's position with regard to a federal act called "Federal Education Rights Privacy Act (FERPA) which highlights the confidentiality concerns under federal law as well as the Government Records and Access Management Act (GRAMA) which sets forth the state statutory provisions which would protect those records.

3. Brent Poll, Petitioner

Mr. Brent Poll stated for the record that he had willingly waived the 30-day period for a hearing after the

appeal was received. He stated that he is requesting two things which have been extracted from the information he has received: the working papers from the Legislative Auditor and the student application information. He thanked the University of Utah and Mr. Payne, their attorney, for being very hospitable and very congenial. They have provided a lot of data, but have withheld the student applicant information. Mr. Poll discussed a Wisconsin Supreme Court decision called *Osborn vs. the Board of Regents of the University of Wisconsin* dated July 2002. He said that the Wisconsin Supreme Court held that a request for applicant data, including grade point averages, SAT scores, race, sex, social economic background, and class rank are not protected under FERPA, nor can they be denied under Wisconsin Open Records Law, which is comparable to Utah's GRAMA, when the information requested does not contain personally identifiable information. Additionally, under Wisconsin's Open Records Law, custodians have an obligation to redact personally identifiable information from an education record in order to comply with the request for non-personally identifiable information or data. Mr. Poll indicated that he agrees with the University of Utah's information that they provided, but he disagrees with their arguments and one of the arguments is that only the Legislative Auditor should be looking into this kind of information. The whole purpose of GRAMA is so that the public can police government and universities and can look into the very things that they are trying to keep from them. He stated that the University of Utah's arguments look good on the surface, especially when you talk about this costing a lot of money to redact the personally identifiable information from the records. No one likes to have anybody put up any kind of funds, but for someone whose son is now going to medical school out of state and it is costing him maybe a quarter of a million dollars more for him to go there, he is not too receptive to that kind of an argument.

Mr. Poll said that regarding the Legislative Auditor General who classified his office working papers protected under Section 63-2-304-9(d), he is not looking for the source of the disclosure, just the underlying information. If there is a question about finding a person who had something to do with the audit and if that shouldn't be disclosed, then redact it. Redaction is easy and it's not expensive.

Mr. Poll said the University of Utah suggests that his interest is a personal one because he had a son that applied at the University of Utah and that is true. His son had a 3.97 grade point average at Weber State, won all kinds of medical field-related awards there, and he didn't get picked when he applied at the University of Utah. He is now a third year medical student at the University of Wisconsin. If you look at the standards at the University of Utah because he wasn't unique, there was no place for him there.

Mr. Poll indicated that he sent some information to Rep. Saunders some time ago outlining all these things and he would like that to be part of the record. He stated that he is not saying that the University of Utah's goals are not realistic or improper in any way, but that it is wrong to have to cheat to reach them. The example in the Legislative Auditor's report of having 30 applicants that passed both committees and should have been sent to the Selection Committee, but they weren't. Twenty eight of those applicants were white males. According to the University of Utah, there wasn't enough time, but it found time to send 60 of the 240 applicants, approximately one-fourth of the ones that went to the Selection Committee that shouldn't have been sent there. Apparently, half of those were sent because the University of Utah owed somebody. The University of Utah sent another 30 applicants because it wanted to test the committee to see if it was on its toes and would reject these applicants just as the first two committees had rejected them. Sometimes the Selection Committee rejected them, but it selected two or three so there are two or three accidents in the medical school. These people are going to be our medical doctors someday and this is where the public interest comes in. Is the social program being engineered through

the medical school admissions practice good for the state and does the public need to know what is happening here?

Mr. Poll said that he has never seen a better study in terms of the accumulation of facts than what he saw in the Legislative Auditor's study. But what happens after you do a study. After you have the facts you have to have conclusions. Where is the conclusion in the Legislative Auditor's study that the University of Utah violated its own principles, its own guidelines for discrimination. Why is that missing? Why didn't the Legislative Auditors send something to the University of Utah and the Board of Regents saying this is wrong?

4. Robert Payne, Office of General Counsel, University of Utah

Mr. Robert Payne said that Mr. Poll is seeking two categories of documents: (1) the underlying admission files for individual applicants who applied to the medical school; and (2) working papers from the auditors. He indicated that he has been asked to present the University of Utah's position with respect to the admission files. He said that Mr. Poll's request for access to the application files is of great concern to the medical school and the University of Utah. The University of Utah and the auditors are prevented from disclosing admissions information by federal and state law. Federal law requires that the University of Utah protect all of the education records of its students and those records may not be disclosed without the express written consent of the students themselves. The penalty imposed by FERPA is loss of federal funding in the event that those records are intentionally or inadvertently disclosed. The University of Utah is a premier institution and derives significant funds from federal funds for its research and it cannot risk the loss of those funds. In addition to the federal law, the University of Utah's admission records are protected by state law and the Legislature has specifically considered and rejected the notion that admission records should be public records. GRAMA provides in Section 63-2-304(28) that records of public institutions of higher education regarding applications for admissions are protected records and are not available for public review. He identified three reasons applications for admissions are protected records: (1) applicants have submitted their information with the expectation that the information will remain confidential; (2) to preserve the integrity and viability of the admissions process itself; and (3) admissions offices are generally understaffed and spend an enormous amount of time coordinating the entire admissions process and do not have extra time to respond to individual requests of the public for application files.

Mr. Payne said that Mr. Poll has suggested that his interests somehow outweigh the interests against disclosure. He suggests that without public scrutiny of individual admissions files, admissions offices will make unprincipled selection decisions. That is not correct. The Legislature has created a mechanism to oversee public entities such as the University of Utah which is the Legislative Audit. The auditors were provided access to all of the medical school files and were allowed to speak to anyone they needed to speak to. At the conclusion, a comprehensive report was prepared which was a public document and made recommendations for change. The University of Utah has implemented those changes and has improved its admissions process. Mr. Poll's suggestion that the files can be sanitized, that this private information can be pulled out, and the University would submit it is not feasible. Because of the nature of the admissions files, it would be impossible to remove that information. Even if it were possible technically to sanitize these files from all the identifying information, it would take an enormous amount of time and

attention on each particular file to figure out what that protected or private information is and pull it out. As a father of a rejected applicant, Mr. Poll's interest in seeking the admissions files is personal and not public. Mr. Poll has sought and received copies of the University of Utah's public information it uses in the admissions process. The only thing he has not received are the individual files of the applicants themselves.

Mr. Payne commented on the *Osborn* case cited by Mr. Poll. He said he has not had a chance to review that case, but without having read it, he would be surprised if there were provisions within Wisconsin's records law that prevented the disclosure of admissions files. Even if the acts were identical, the fact that one state court in the entire nation makes a decision about a federal law is not binding on a Utah court and is not significant precedence here. It is significant that Mr. Poll referred to the Legislative Auditor's report and how detailed the findings were and that is evidence itself that the process does work.

Speaker Stephens said he feels Mr. Payne is minimizing the public importance of having some accountability in this process. Without Mr. Poll and others coming forward, there would have been no legislative audit, and the audit conclusively showed that there were some discriminatory things happening at the University of Utah Medical School and without this audit, there would not have been changes made. It has a dramatic impact on the public of this state and how the admissions policy has been handled. He asked what would be wrong with LRC asking the University of Utah to release the information in aggregate on selected pieces of information so that Mr. Poll and others could get the information that they are concerned about.

Mr. Payne said that all he is suggesting is that the present structure or system for oversight worked appropriately, that there were complaints made, and that the Legislature did what it could do under the statutes in having the Legislative Auditor's Office look into it. He is not suggesting that there shouldn't be public scrutiny. There is a mechanism for that. GRAMA requires the disclosure of certain records. It does not require that institutions create records to disclose any type of information so what LRC would be asking the University of Utah to do is not to reveal its own records, but instead to create a new document that it could disclose to Mr. Poll. That is an obligation the University does not have under GRAMA and it would take a great deal of time.

Rep. Becker asked Mr. Payne if he feels there would be a problem aggregating the information the way the Speaker has identified. Mr. Payne said that when you start aggregating information and saying student A who has a 3.7 GPA, is male, and an African American, you have identified maybe the one African American in the class and have told everyone what his GPA is. Because there aren't that many African Americans that apply, there is less personally identifying information if you are talking about a non-minority male application pool.

5. Legislative Auditor General's Office

Mr. Wayne Welsh, Legislative Auditor General, said that the Legislative Auditor's report achieved the same goal that Mr. Poll is attempting to achieve. The report focused on the factors regarding race, gender, and others, and related those to the acceptance of those students. The report also discussed how the practices that were found during the audit were not consistent with the University of Utah or the State

Board of Regents antidiscrimination policy. There is a recommendation in the report that encourages the University of Utah not to discriminate in its admission procedures, and that recommendation, along with the others in the report, were agreed to by the University of Utah before the Higher Education Appropriations Subcommittee last spring. So there has been impact and results from the audit. Mr. Welsh said that the auditors did produce and allow Mr. Poll to review and copy about 90% of their working papers. Included in that 90% were the summaries of the acceptance rate information that was included in the report. The other 10% of the working papers are considered to be confidential or protected and contain admissions information from the University of Utah Medical School which the auditors have classified as protected and the auditors are obligated under GRAMA when they obtain information from other agencies or organizations to maintain the same level of confidentiality that the originating entity has imposed on those records. The other part of the protected segment of their working papers has to do with records of discussions the auditors had with certain people, students, faculty members, and members of the medical community in this area about their experiences, feelings, and opinions regarding the medical school admission process.

Mr. Tim Osterstock, Legislative Auditor General's Office, said that anyone that wants to have protected status has to ask the auditors for it and they have to get a sense that they would believe that they would be damaged or hurt in some way by making this information public. The auditors do not have that many records that were not already disclosed and those records are available to look at in camera. Where they could, the auditors put that information together in aggregate and those records resulted in some of the recommendations in the report. He said that the University of Utah Medical School does treat this information very seriously. When the auditors were looking at this information, the University of Utah required them to sign documents in which they agreed to keep certain records confidential. The University of Utah treats FERPA so seriously that it destroys all information when it is finished with it. The only information that the auditors have they were able to glean was from the current year that had not yet been destroyed and they were able to find a backup document with a few precious years that had been overlooked in the destroying of the documents.

Speaker Stephens asked that LMC take a short recess to be able to look at the University of Utah's documents in camera before a decision is made.

Mr. Poll said the one thing that has been very evident as we have heard both sides is what a nuisance GRAMA is, what nuisances the privacy acts are. But he asked, why do we have these GRAMA laws? He stated there is a reason. Does the public have to rely just on the Legislative Auditor? What if there are some political considerations? What if there are some money considerations? The Legislative Auditors say they found some difficulties with the process. About a month or so ago the Deseret News said there could be a few people thinking there is something wrong. It's not getting published out there that the Legislative Auditor says there is something wrong. Mr. Poll said he has information that says what the University of Utah Medical School did is not just wrong, this was not high minded, this was bias. He said the University's view is that white people do not offer anything; white males do not offer anything to the University of Utah program. This is not high minded. It could be political; it could be a lot of things; it's definitely a nuisance, but he feels that the most fundamental of all these things is that the public has the right to come in and tell the media that the University of Utah goofed up. The University of Utah had a lofty goal, but it cheated to get there and then it gave itself awards for it. The most important laws we

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have are the ones the committee is trying to find its way around here.

Rep. Becker said what he has heard from the University of Utah that makes sense is that when you get to that level of detail because of the limited number of students that are involved, it is very easy for that person's identity to be easily determined. He asked Mr. Poll how he would suggest that the University of Utah deal with that question, and the problem for LRC and for the individual so that the individual's right to privacy line is not crossed.

Mr. Poll said if it gets down to that point, redact that part. He will not find out who the one African American is and he will have to live without that, but this isn't just about the University of Utah, this privacy would relate to every aspect of GRAMA. There is not one institution in this state that you couldn't throw up the same privacy defense. He stated he is not concerned about the one black at the University of Utah that got accepted; but he wants an overview of the entire program.

Speaker Stephens said he is a great fan of GRAMA.

Sen. Dmitrich asked Mr. Poll what he is hoping to accomplish with the information. He thinks the University of Utah's admission policies are going to be better because of the audit. Mr. Poll said his son is not going to sue the University of Utah. It is something they considered. He has never seen the University of Utah even one time agree that it did something wrong. He would like to see some form of apology to those 30 applicants, 28 of which were white males, that went through all they went through to get their application before the selection committee. They just received the same rejection letter as the rest of the students. Something needs to be done and he thinks a little humility is not a bad thing for the University of Utah.

The committee recessed at 1:00 p.m.

Speaker Stephens called the meeting back to order at 1:15 p.m.

MOTION: Rep. Becker moved that under Section 5 of the Utah Legislature Policies for Handling Records Requests, Subsections (12) and (13), that the LRC uphold the determination of Wayne Welsh and Tim Osterstock, the legislative records officers in this case and that an order be prepared that reflects the reasons for the committee's decision.

Rep. Becker noted that his inclination is always to look out for the public's access to records and GRAMA is one of the great ways that we open our governmental process and decisions to the public and it is one of the great things the Legislature has done with the Speaker as the sponsor of that bill. It provides an enormously valuable function because it gives the public access to records as to the way the Legislature makes decisions and the basis for those decisions; and it is a way to expose problems with the Legislature's decisions and problems. He thinks that is a very important part of what the citizen's government is supposed to be about. But that is also counterbalanced with the right of privacy. In reviewing the materials and hearing the testimony today and in looking at some of the records and the way the data has been compiled, we have to take very seriously the privacy of individuals. His belief based on the information that was provided to the Legislative Records Committee, balancing the protection of the privacy of individuals and giving maximum access to the public, that our legislative officers and the university have done their best to balance that equation. He noted processes hopefully that the Legislature and the University of Utah have now put in place that will remedy whatever wrongdoing Mr. Poll has identified. He commended Mr. Poll for bringing this information forward and hopes it will result in some good changes. He does not see a way for the committee to go beyond the present disclosure of 90 percent of the Legislative Auditor's records without invading the privacy of the individuals and that has obvious consequences for the university. But, that is not his overriding concern, his overriding concern is really that privacy is an important element in our society as well. And as important as our access is for the public and for many of us who are interested in how public decisions are made

and the basis for those decisions, that there is that protection of privacy and we need to draw the line as carefully as we can.

Sen. Dmitrich noted that 90% of the information had already been made available to Mr. Poll and that is a lot of information. He thinks privacy is an important factor. He noted that the audit report has indicated that there are some problems and he thinks a follow-up audit will be done within a year or so to see if the Legislative Auditor's recommendations have been implemented so he spoke in favor of Rep. Becker's motion.

Speaker Stephens said he agrees with Rep. Becker's conclusion, but he has not found a way that LRC can release this data without identifying students and that has to be their primary concern. He does not agree that this is tough or too expensive because he thinks that those things all should be weighed in the balance of the public and he thinks that as governmental entities, they have a stronger responsibility to provide this data and be open to the public. As to the University of Utah showing some humility, he is not sure they can rule on that part. He only had maybe three or four minutes with the records and the information he saw there he thinks needs to get out to the public, some of it because there were numerous references on the applicants' forms that this is a white male and numerous references to their religious background, and it is not fair to the citizens of the state to have decisions made on that basis. He stated that he is torn because if you don't get this information out to the public that this is what is happening in the process. But if you do get the information out then you are compromising personal information on some of these applicants. If some of the comments that were made in there about the predominant religion in this state were made regarding the Jewish faith or some of the other faiths and that became public information, there would be an outrage in this state that would go nationwide. Without the public disclosure of that information about the University's admission process, how do we have any sense that this won't continue in the future.

Speaker Stephens said he will vote no and rely on page 22, paragraph (14) that says: "If the legislative Records Committee fails to issue a decision within 35 days of the filing of the notice of appeal, that failure shall be considered the equivalent of an order denying the appeal." He asked if a decision needs to be made today or if there is time after the hearing? Ms. Taylor said LRC has three days and if it doesn't make a decision, it is presumed that it is no.

Rep. Becker said he does not disagree with the Speaker. He thinks Mr. Poll has done a great service in coming forth and he feels that the University of Utah is operating under certain conditions and we need to respect those conditions. He indicated that his feeling is that the audit has exposed that issue and hopefully will result in actions and procedures that will prevent this from happening in the future, but that does not change what his decision is in this case.

The Speaker ruled the motion passed with Speaker Stephens voting in the negative.

MOTION: Sen. Dmitrich moved to adjourn. The motion passed unanimously.

Speaker Stephens adjourned the meeting at 1:35 p.m.